U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 19, 2005

The Honorable William H. Frist, M.D
Majority Leader
United States Senate
Washington, D.C. 20510

The Honorable Harry Reid
Minority Leader
United States Senate
Washington, D.C. 20510

Dear Senators Frist and Reid:

Yesterday, as the Senate opened its consideration of Justice Owen's nomination to the United States Court of Appeals for the Fifth Circuit, some senators have repeatedly cited to certain language pulled from a concurring opinion in *In re Doe* written by the Attorney General when he and Justice Owen served together on the Texas Supreme Court. As the Attorney General has explained on numerous occasions, the statement in his concurring opinion has been misconstrued by those opposed to Justice Owen's nomination. The Attorney General has consistently -- and as recently as last week -- rejected this mischaracterization of his *In re Doe* opinion and voiced his strong and unequivocal support for Justice Owen.

In a July 16, 2002, editorial in the *Dallas Morning News* Attorney General Gonzales stated that, "Some have questioned Justice Owen's qualifications because she and I disagreed at times on the interpretation of a new Texas parental notification statute in 2000. As all judges know, cases of statutory construction often result in disagreements among judges honestly struggling to interpret the statute, particularly when the statute is vague or ambiguous." He added, "[t]he fact that Justice Owen and I disagreed in some cases is unremarkable. . . . She is an outstanding jurist and will perform superbly as a federal appeals court judge."

At his January 6, 2005, confirmation hearing Attorney General Gonzales also testified regarding the sentence in his concurring opinion in *In re Doe*:

> My comment about an act of judicial activism was not focused at Judge Owen or Judge Hecht. It was actually focused at me. What I was saying in that opinion was that given my interpretation of what the legislature

> intended by the words that they used in terms of having a minor not totally informed or well informed but sufficiently well informed, and the structure of the act, it was in my judgment that the legislature did intend the judicial bypasses to be real. And given my conclusion about what the legislature intended, it would have been an act of judicial activism not to have granted the bypass in that particular case.
>
> If someone like Judge Owen in that case reached a different conclusion about what the legislature intended, it would have been perfectly reasonable for her to reach a different outcome. But as to the words that have been used as a sword against Judge Owen, let me just say that those words were related to me in terms of my interpretation of what the legislature intended, again, through the words of the statute and the way that the judicial bypass procedure would actually operate in practice.

Likewise, Attorney General Gonzales addressed the sentence in his January 2005, written responses to questions for the record submitted by Senator Richard Durbin. Attorney General Gonzales again explained:

> The statement that you quote from my concurring opinion was not directed at Justice Owen, but rather was a comment indicating that for *me* to go further than I believed statutory construction warranted would have been judicial activism. As I explained during my testimony before the Committee, what I wrote in my opinion was that, having formed a view as to what particular requirements the Texas legislature had intended to impose on a minor seeking to bypass parental notification—and, in particular, having concluded that the Texas legislature had not intended those requirements to be so strict as to effectively eliminate the possibility of satisfying them—I could not, as a judge, proceed to apply the statute "so narrowly as to eliminate bypasses, or to create hurdles that simply are not to be found in the words of the statute." For me to have done so, in the face of my understanding of the statute, would have been, as I stated, "an unconscionable act of judicial activism." This statement was not a rebuke of the dissenting judges, such as Justice Owen. She had in good faith construed the ambiguous terms of a very difficult statute differently than I had done and for that reason reached a different conclusion. It is not unusual for two judges who share common assumptions about their roles as judges to reach different conclusions when considering complex questions of statutory interpretation; that circumstance does not necessarily mean that one of the judges is engaging in "activist" judging, and it did not mean so in this case. It was never my intention to suggest otherwise.

Finally, on May 9, 2005, while speaking to the press Attorney General Gonzales stated:

> As to Justice Owen, I have consistently said that I believe that she's well qualified and would do a terrific job on the 5th Circuit Court of Appeals. Judges disagree from time to time on particular issues. That doesn't in any way detract from my view that she would make a terrific judge on the 5th Circuit. I've never accused her of being an activist judge.

The record is clear, and the persistent mischaracterization of the Attorney General's statement in *In re Doe* is troubling in light of the established public record. Justice Owen has Attorney General Gonzales's unequivocal support, and any suggestion to the contrary is wrong.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General